IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

MAY 5 1975

MICHAEL RODAK, JR., CLERK

No. 74-1388

ERLE E. PEACOCK, JR.,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITIES AND STATE COLLEGES OF ARIZONA; JACK R. WILLIAMS, WELDON P. SHOFSTALL; PAUL L. SINGER, SIDNEY S. WOODS, GORDON D. PARIS, JAMES E. DUNSEATH, MARGARET M. CHRISTY, KENNETH G. BENTSON, RALPH M. BILBY and RUDY E. CAMPBELL, each of the foregoing individually and in his or her capacity as a member of the Board Of Regents Of The Universities And State College Of Arizona; JOHN LENTZ and NORMAN SHARBER, each individually; JOHN P. SCHAEFER, individually and in his capacity as President of the University of Arizona; MERLIN K. DU VAL, individually and in his capacity as Vice President for Health Sciences and Acting Dean of the College of Medicine, University of Arizona; and DOUGLAS H. LINDSEY, individually and in his capacity as Acting Head of the Department of Surgery, College of Medicine, University of Arizona,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner Erle E. Peacock, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 4, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals, which has not been reported, appears in Appendix B hereto. The opinion rendered by the District Court for the District of Arizona and the Findings of Fact and Conclusions of Law, made by the Honorable Howard B. Turrentine, United States District Court Judge, which will not be reported, appear in Appendix A hereto. Petitioner did not petition the Court of Appeals for a rehearing or suggest a rehearing *en banc*.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on Februray 4, 1975 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 *U.S.C.* § 1254(1).

QUESTIONS PRESENTED

1. Whether, under the *First* and *Fourteenth Amendments*, the Head of a Department of Surgery in a state university, "who serves as the chief representative of his department faculty within [the] institution," may be suspended by the University President, without prior notice or hearing, based solely on philosophical differences of

opinion about the quality and nature of the medical education to be offered at the medical school?

2. Whether a person with an interest in continued employment or a particular status protected by the *Fourteenth Amendment* can be deprived of that protected interest by suspension therefrom without prior notice or hearing of any kind?

3. Whether the suspension of a Head of a Department of Surgery in a state university's only medical school which suspension the Circuit Court stated adversely reflected on him, which it stated resulted in a suggestion of incompetence, and which the District Court stated resulted in no further offers of employment as a Head of a Department of Surgery implicated or violated a liberty interest under either of the tests set forth in *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972): (1) whether the termination is based on charges which "might seriously damage . . . [the employee's] standing and associations in his community" or (2) whether the state, in terminating the employment, "imposes on . . . [the employee] a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities."

4. Whether, assuming arguendo that a person with a protected interest under the *Fourteenth Amendment* can be deprived thereof without prior notice or hearing, the post suspension hearings ordered herein contain the minimum elements of procedural due process when, as here, the state official who suspended such person selects one of two members of the tribunal which member then joins with the second to select a third, when such official has testified herein that he is not bound by the recommendation of such tribunal and in fact will not follow it if a recommendation is made to reinstate Petitioner as Head, and when the tribunal's proceedings do not provide for specific charges, notice in advance of the hearing of the

nature of the testimony of witnesses against him, cross-examination of witnesses, or an open hearing?

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment:

"Congress shall make no law . . . abridging the freedom of speech. . ."

Fourteenth Amendment, Section One:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

Petitioner, a graduate of the Harvard Medical School, is one of the foremost academic surgeons in the world, is the author of one hundred and forty-four scholarly medical papers and a leading text on wound repair, is the only researcher licensed by the F.D.A. to administer to human beings an experimental drug developed by him to eliminate the formation of scar tissue which is a primary cause of death, sits on the governing board for the certification of medical specialties in American medicine, is the receipient of national medals for excellence in surgery, is listed in *Who's Who in America*, and holds substantial federal grants for research.

In 1969, Petitioner, who was then on the faculty at the College of Medicine, University of North Carolina at Chapel Hill, was asked by University of Arizona administrators if he would come to its newly formed College of Medicine to organize

and develop the Department of Surgery as its Head, a seven to ten year job. Between 1969 and October 25, 1973, the date when Petitioner was dismissed as Head without any notice or hearing, Petitioner organized the Department of Surgery, recruited an outstanding faculty of twenty-five members, and had begun the development of a Department of Surgery which University of Arizona officials, including its President, conceded was one of the best departments in the University of Arizona and probably the best department in the College of Medicine.

On May 27, 1973, Petitioner received and accepted a written contract from the University of Arizona "for the fiscal year 1973-1974 effective July 1, 1973" as Professor *and* Department Head in the Department of Surgery in said university. The fiscal year was the period July 1, 1973 to June 30, 1974. Thereafter, in August of 1973, Petitioner was unanimously elected Head of the Department of Surgery by the department faculty.

However, on October 25, 1973, during the term of the foregoing contract or contracts and after his election as Head by the department faculty, Petitioner was dismissed as Head without notice and hearing. From October 25, 1973 to February 11, 1974, the Department of Surgery faculty sought action by the University administration to reinstate Petitioner as Head until he was afforded a due process hearing. On February 11, 1974, the University of Arizona administrators responded by suspending Petitioner from his tenured professorship, again without any notice or hearing.

This action, which sought Petitioner's reinstatement as Head and as Professor until a due process hearing had been accorded him with respect to each position, was commenced on February 22, 1974.

Hearings were held on a motion for

preliminary injunction seeking reinstatement as Head and as Professor during March of 1974. At those hearings and in lengthy memoranda, Petitioner contended that he had been denied his *Fourteenth Amendment* rights to procedural due process hearings when he was first dismissed as Head and later suspended as a tenured professor without notice and prior hearings since both his property interests and his liberty interests were implicated in both the dismissal as Head and suspension as Professor.

Petitioner contended that his property interests were involved in the October 25, 1973 dismissal as Head because he had three separate and distinct legitimate claims of entitlement to his position as Head. They were: (1) the written contract of employment as Head for the period July 1, 1973 to June 30, 1974; (2) the common law of the campus at the University of Arizona accorded to department faculties the right to select their own Head; and (3) his employment in 1969 to do a 7-10 year job of organizing and developing the Department of Surgery. Petitioner's claim that his liberty interests were implicated in the dismissal as Head was grounded on the propositions that: (1) a termination during the term of a contract imposed a stigma or other disability which foreclosed his opportunity to take advantage of other employment opportunities as Head of a Department of Surgery; (2) his dismissal was in punishment for his exercise of free speech at department head meetings where he expressed the views of his department faculty; (3) his dismissal as Head was based on charges which seriously damaged his standing and associations in his community; and (4) his dismissal as Head contravened the principles of academic freedom since it was based on "philosophical differences."

Petitioner's contention that his property interest was involved in the subsequent suspension as a tenured professor was based on two legitimate

claims of entitlement to said position: (1) he was a tenured professor; and (2) the written contract of employment as Professor for the period July 1, 1973 to June 30, 1974. His claim that his liberty interests were implicated in the suspension as Professor were based on arguments that: (1) the suspension was punishment for expression of views protected by the *First Amendment*; (2) the suspension during a term of contract imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities as a professor; and (3) the suspension seriously damaged his standing and associations in his community.

On May 7, 1974, the District Court entered an order reinstating Petitioner as Head of the Department of Surgery, but further provided, without citation of any authority, that the University had the "option" of immediately suspending him from his position as Head without notice and a hearing. The University of Arizona administrators then suspended Petitioner on May 7, 1974, within two hours after receipt of the opinion, without notice or hearing. The District Court also ruled that Petitioner was not entitled to either a pre-suspension hearing or a post-suspension hearing insofar as his tenured professorship was concerned, and therefore refused to reinstate him to such professorship.

The appeal to the Court of Appeals was filed on June 3, 1974.

While the appeal was pending, University of Arizona administrators, in response to faculty action and urging by the American Association of University Professors, reinstated Petitioner to his tenured professorship. The latter action rendered moot the appeal concerning the refusal of the District Court to reinstate Petitioner to his tenured professorship, and the Court of Appeals therefore ruled only on the issue of Petitioner's right to notice

and a due process hearing prior to his May 7, 1974 suspension as Head as authorized by the District Court.

The Circuit Court held that: (1) Petitioner had a protected property interest in his employment as Head; (2) the University of Arizona violated due process in dismissing him as Head on October 25, 1974 without notice and hearing; but that (3) even absent exceptional circumstances, none of which exist here, due process does not require notice or a hearing before Petitioner's suspension as Head on May 7, 1974 if there exists a "*potential threat* to the administration of a . . . school and the incidental *threat* of disruption of the functioning of the University Hospital." The Circuit Court thus held that in determining whether a person is entitled to a due process hearing before his property is taken, his interests in receiving the hearing provided for in the *Fourteenth Amendment* must be balanced against the state's interests in denying him such a hearing.

In addition, the Circuit Court also held that Petitioner's liberty interests were not implicated in his suspension as Head.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES IN *PERRY V. SINDERMANN*, 408 U.S. 593, 597-598 (1972); *KEYISHIAN V. BOARD OF REGENTS*, 385 U.S. 589, 605 (1967); AND *SHELTON V. TUCKER*, 364 U.S. 479, 485-486 (1960), HOLDING THAT AN EDUCATOR'S LIBERTY INTEREST IS DENIED WHEN, AS HERE, THE DECISION TO SUSPEND HIM FROM HIS EMPLOYMENT AS HEAD OF THE DEPARTMENT OF SURGERY INFRINGES UPON OR DETERS OR PUNISHES THE EXERCISE OF FREE SPEECH.

A violation of due process occurs if a suspension of a university educator is based on his exercise of free speech. *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Sherbert* v. *Verner*, 374 U.S. 363 (1963); *Shelton* v. *Tucker*, 364 U.S. 479, 485-486 (1960); *Slochower* v. *Board of Education*, 350 U.S. 551 (1956); *Wieman* v. *Updegraff*, 344 U.S. 183 (1952). This civil liberty or collateral right is ensured by due process as a liberty within the *Fourteenth* and *First Amendments*. *Shelton* v. *Tucker*, *supra*; *Pred* v. *Board of Public Instruction of Dade County, Fla.*, 415 F.2d 851, 856 (5th Cir. 1969). The free exercise of this civil liberty is guaranteed by the *Bill of Rights* through incorporation in the *Fourteenth Amendment* against infringement by a state. *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605 (1967); *Sherbert* v. *Verner*, 374 U.S. 398, 404-406 (1963); *Speiser* v. *Randall*, 357 U.S. 513, 518, 526 (1958). Therefore, any decision of a state to suspend a

university educator which infringes upon or deters or punishes the exercise of free speech is a deprivation of the liberty interest of the amendments. *Keyishian, supra; Sherbert, supra; Speiser, supra.* The protections of due process attach once such a liberty has been implicated. *Speiser, supra* at 513, 520-521, 524. Hence, even though an educator may lack a protected property interest in continued employment due to absence of tenure or a contract, he may not be terminated if the reason therefor was predicated on his exercise of his free speech *First* and *Fourteenth Amendment* rights. *Perry v. Sindermann*, 408 U.S. 593, 597-598 (1972); *Keyishian v. Board of Regents, supra; Shelton v. Tucker, supra.*

The Statement on Government of Colleges and Universities of the American Association of University Professors states that the chairman or head of a department "serves as the chief representative of his department within an institution," and should be selected by departmental election or appointed in conformity with department members' judgment. That the University of Arizona adheres to this principle is shown by the following testimony of its President:

> "Q. Well, let us talk about practice, then.
>
> Is it not correct that the Department of Geosciences, Physics, Journalism, Government, and Chemistry normally recommend, by whatever means they use, a person to be head of the department, and in practice you have appointed the person they recommended?
>
> A. This almost always happens, that is correct.

Q. That is correct in practice?

A. In practice, this is true throughout our 98 departments in the University.

Q. The common law of the campus, is that correct?

A. Yes."

Hence, the Head of a Department at the University of Arizona speaks for his department faculty, and is not a mere echo of either the Board of Regents or the University's administrative bureaucracy of president, vice presidents, assistant vice presidents, deans, assistant deans, controllers, registrars, and public relations men. Rather he fulfills, as the A.A.U.P. principles also state, his "special obligation to build a department strong in scholarship and teaching capacity" by presenting and advocating within the University of Arizona the views of the department faculty respecting educational philosophy and the consequences of such philosophy to issues of budget, space, faculty hiring and promotion, student training, and research allocations. Therefore, to the extent that the suspension of a department head at the University of Arizona is based on the exercise of free speech, both he and the department faculty, as well as academic freedom, have been seriously damaged.

That Petitioner's free speech was in fact implicated is shown by the University President's letter to Petitioner shortly before Petitioner's dismissal as Head without notice or hearing which letter stated that despite said President's conclusion that the Department of Surgery "has developed into a very strong unit that is attracting national attention," that Petitioner had "done an effective job of developing the Department;" and that "you should

take a considerable measure of pride in this accomplishment,"

> "I do have serious doubts about your ability to continue to administer the Department effectively because of the serious *philosophical* differences that have developed between you and the College administration." (Emphasis supplied). (See Appendix C for entire letter).

Since the only persons who stand beyond a Department Head in the College of Medicine are the Dean and Assistant Deans, it is clear that Petitioner, the chief representative of the department faculty within the University of Arizona, was dismissed and suspended without notice and hearing because his and the department faculty's views on educational philosophy differed from those of the Dean, an administrative functionary. That Petitioner spoke eloquently and effectively for the Department of Surgery faculty is shown by such faculty's unanimous support of Petitioner before and after the unlawful dismissal and their election of him as Head before and after the said dismissal.

More importantly, the Ninth Circuit has in substance held that it was only Petitioner's speech which was the basis of his suspension. The opinion states that the University "sought to remove him *solely* because of his lack of cooperation stemming from *differences of opinion* about how to run a medical school," but that "we do not intimate that appellant in fact refused to perform tasks assigned by the administration or that his lack of cooperation ever damaged either the medical school or the Hospital." That is, Petitioner's "lack of cooperation" was verbal.

A clearer case of speech constituting the

basis of suspension of a university educator is difficult to imagine. It is an especially offensive violation of the *First Amendment* when that educator is the chief representative within the university of the department faculty's views on educational philosophy. "No more direct assault on academic freedom can be imagined than for the school authorities to be allowed to discharge a teacher because of his or her philosophical, political, or idealogical beliefs." *Board of Regents* v. *Roth*, 408 U.S. 564, 581 (1972) (dissenting opinion of Justice Douglas). "Political power must abstain from intrusion into this activity of freedom [progress in the natural sciences] . . . ." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 262 (1957) (Mr. Justice Frankfurter concurring in result). *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1966), stated:

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

Consequently, the Ninth Circuit's decision that the suspension of Petitioner from his state employment as Head of the Department of Surgery did not impair his liberty interests conflicts with the foregoing decisions of this court.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES IN *GOSS V. LOPEZ*, 43 U.S.L.W. 4181 (Jan. 22, 1975); *ARNETT V. KENNEDY*, 416 U.S. 134 (1974); *BOARD OF REGENTS V. ROTH*, 408 U.S. 564 (1972); *PERRY V. SINDERMANN*, 408 U.S. 593 (1972); AND *FUENTES V. SHEVIN*, 407 U.S. 67 (1972), SETTING FORTH THE PROCEDURAL DUE PROCESS REQUIREMENTS A STATE MUST AFFORD A CITIZEN PURSUANT TO THE *FOURTEENTH AMENDMENT* BEFORE SUSPENDING A PROTECTED PROPERTY INTEREST.

The Ninth Circuit ruled that a person having a protected interest entitled to due process procedural safeguards can be deprived of that interest without a prior hearing. It arrived at that conclusion as follows:

On May 7, 1974 the District Court entered its decision on Petitioner's Motion for a Preliminary Injunction in which Petitioner asked that he be reinstated as Head of the Department of Surgery at the University of Arizona College of Medicine because he had not been afforded a pre-termination hearing prior to his dismissal as Head on October 25, 1973. The District Court ruled:

(1) That Petitioner had a property interest in his position as Head protected by the *Fourteenth Amendment;*[1]

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1 Appendix A, pages A-9 to A-10.

(2) That said property interest was created by a contract issued by the University and signed by Petitioner; [2]

(3) That said contract was for the term July 1, 1973 to June 30, 1974 and had a balance of approximately eight and one-half months remaining when Petitioner was dismissed; [3]

(4) That the Due Process Clause of the *Fourteenth Amendment* requires that a person having a protected property interest be afforded a due process hearing before such interest is terminated unless special emergency conditions make such a hearing hazardous; [4]

(5) That Petitioner did not receive any such hearing; [5] and

(6) That no such emergency conditions existed on October 25, 1973 warranting Petitioner's dismissal without a prior hearing. [6]

Consequently, the District Court ordered reinstatement of Petitioner to his position as Head of the Department of Surgery but simultaneously granted Respondents the "option" of summarily suspending Petitoner from his duties pending a termination hearing to be held pursuant to University of Arizona procedures relating to the dismissal of tenured faculty members. [7] The Ninth Circuit affirmed.

In ordering the reinstatement of Petitioner to

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2 Appendix A, pages A-9 to A-10.
3 Appendix A, page A-9.
4 Appendix A, page A-10.
5 Appendix A, page A-4.
6 Appendix A, page A-10.
7 Appendix A, page A-11.

his employment or status as Head, the District Court correctly applied this Court's decisions. It first found that Petitioner had a protected property interest in his continued employment as Head of the Department of Surgery at the time of his dismissal and that therefore, pursuant to the *Fourteenth Amendment*, he could not be deprived of such interest without a pre-deprivation hearing. *Goss* v. *Lopez*, 43 U.S.L.W. 4181 (Jan 22, 1975); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Connell* v. *Higginbotham*, 403 U.S. 207 (1971); *Bell* v. *Burson*, 402 U.S. 535 (1971); *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Slochower* v. *Board of Education*, 350 U.S. 551 (1956); *Weiman* v. *Updegraff*, 344 U.S. 183 (1952). Then the District Court concluded that Petitioner could not be dismissed without a pre-dismissal hearing.[8]

However, when the District Court authorized the University administration to summarily suspend Petitioner as Head with pay after first ordering his reinstatement on May 7, 1974, it erroneously sanctioned a violation of Petitioner's right to a due process hearing prior to his suspension. A suspension is the equivalent of a termination under the Supreme Court's interpretation of the *Fourteenth Amendment*. In *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), the Court stated at pages 84-86:

> "But it is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in terms of the Fourteenth Amendment.
>
> . . . The Fourteenth Amendment draws no bright lines

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8 Appendix A, page A-10.

> around three day, 10-day or 50-day deprivations of property."

Thus, any suspension of Petitioner, even with pay, absent extraordinary or emergency circumstances, must be carried out under the same procedures required by the *Fourteenth Amendment* for a termination of Petitioner. *Lafferty v. Carter*, 310 F. Supp. 465 (W.D. Wis. 1970). Hence, when the District Court concluded termination could not lawfully be accomplished without a due process pre-termination hearing but that no due process hearing was required prior to suspension, such conclusion directly conflicts with the holdings of *Goss v. Lopez, supra; Arnett v. Kennedy, supra; Board of Regents v. Roth, supra; Perry v. Sindermann, supra; Fuentes v. Shevin, supra.*

Therefore, the question confronted by the Ninth Circuit was simple: does the *Fourteenth Amendment* require any notice or pre-deprivation hearing before a citizen's protected property interest is suspended or terminated?

The Ninth Circuit, in affirming the District Court's ruling that no such hearing is required, stated that prior to 1974 a pre-suspension hearing would have been required absent a showing that special circumstances existed warranting summary dismissal or suspension, none of which existed here.[9] The basis of the Ninth Circuit's ruling was

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9 Appendix B, page A-20. The District Court also found no special circumstances existed on May 3, 1974 because at the time it reinstated Petitioner it granted the University of Arizona the *option* of suspending him, an option the court could not be certain would be exercised. If dangerous or hazardous circumstances required the denial of a pre-suspension hearing, the court would *never* have given

its statement that in 1974 the Supreme Court decided two cases which changed the law.[10] The Ninth Circuit held that *Arnett v. Kennedy, supra,* and *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), required a court to balance the interests of the state and the interests of the individual in determining *whether* prior notice or a pre-suspension hearing is required by the *Fourteenth Amendment* when a protected property interest is to be affected. The Circuit Court concluded that the District Court, after such balancing, had properly permitted summary suspension because the University's interest in obviating a "potential threat"[11]

Respondents the opportunity of returning Petitioner to his duties.

10 "Appellant contends that absent exceptional circumstances (none of which here exists) the outcome of that traditional due process balancing test is presumptively weighted in favor of a prior hearing. He cites several cases to support his position - *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972); *Bell v. Burson*, 402 U.S. 535, 542 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 259-260, 264 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339, 342 (1969) - which, particularly *Fuentes*, indeed support his contention. *See also Board of Regents v. Roth, supra,* at 570 n. 7. Before the Court's decisions last term in *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), and *Arnett v. Kennedy*, 416 U.S. 134 (1974), we might have agreed. *See Geneva Towers, supra* at 14; *Stewart v. Pearce*, 484 F.2d 1031 (9th Cir. 1973)." Appendix B, page A-21.

11 The Ninth Circuit further limited the phrase "potential threat" by stating in explanation thereof: "We do not intimate that appellant in fact refused to perform tasks assigned by the administration or that his lack of cooperation ever damaged

to the administration of a medical school was sufficient to outweigh Petitioner's interest in a hearing *before* he was deprived of his protected interest. That is, a state can deny a person having a protected interest a hearing before depriving him of that interest if it can think of a "potential threat" to the administration of a university. However, the test applied by the Ninth Circuit is based on an erroneous reading of *Arnett, supra,* and *Mitchell, supra.*

In *Mitchell, supra,* the Court upheld a Louisiana statute which permits a creditor to obtain an ex parte sequestration order to sequester personal property upon which payment is allegedly overdue by presenting a verified petition to a judge. The creditor is also required to post a bond to indemnify a debtor for all injury caused by a wrongful sequestration, including attorney's fees. The debtor can dissolve the order within a few days by application to the court. The majority opinion stated at pages 604, 616 and 618-169, that its decision was based upon the following considerations: (1) the area of debtor-creditor relations is *unique* because of the duality of interests in the affected property and the importance of maintaining commercial credit; (2) the entire procedure was *judicially supervised;* and (3) *quick relief* and full *payment* for injuries were guaranteed the wrongfully affected debtor. The instant case bears no factual resemblance to the *Mitchell* case, *supra.* Commercial credit, the unique debtor-creditor relationship and court supervision are totally absent herein, as is any opportunity for quick relief and full payment for injuries. *Mitchell* is not in point.

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either the medical school or the Hospital - the University's interest in obviating a potential threat is here sufficient to justify the suspension pending a hearing." Appendix B, page A-26.

Arnett does not support the Circuit Court's ruling. Rather, it directly supports Petitioner's right to a pre-suspension hearing. The *Arnett* case involved an attack on the constitutionality of statutory dismissal procedures under the *Lloyd-LaFollette Act*, 5 *U.S.C.* § 7501 (1970). The statute was upheld even though a full evidentiary hearing was not provided to employees until after termination. The Ninth Circuit held herein that the case stood for the proposition that a government employee with a protected property interest in continued employment could be summarily suspended or terminated if an evidentiary hearing were provided after the termination or suspension. What the Court failed to note, however, was that three of the six justices who voted to uphold the Act specifically approved of it only because certain pre-termination safeguards were provided,[12] namely, 30 days notice with a full list of specific charges and the opportunity for the employee to present affidavits and a personal appeal to the superior officer authorizing the dismissal. The Court held in *Arnett* that *some* type of prior notice and hearing were required by the *Fourteenth Amendment* before a protected interest could be affected and the Court found that the employee received them there. In the instant case, no hearing whatsoever was afforded Petitioner prior to suspension, nor did he receive a list of specific charges or an opportunity to rebut them.

Arnett and *Mitchell* require that a court, when deciding what is required by the *Fourteenth Amendment before* a protected interest can be terminated or suspended, must balance the interests of the state against the interest of the individual.

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12 Justices White, Powell and Blackmun; White, 416 U.S. at 195-196; Powell and Blackmun, 416 U.S. at 170.

However, *such balancing determines the type of notice and hearing required by the Constitution and not whether a prior hearing is to be held at all.* In *Arnett, supra,* three Justices ruled a full evidentiary hearing had to be afforded a person prior to termination or suspension and three Justices held such a hearing could be held after termination or suspension *if* some notice and hearing were afforded *prior* thereto.

That Petitioner's foregoing reading of *Arnett* and *Mitchell* is correct is shown by the recent case of *Goss* v. *Lopez*. This decision involved high school students who were summarily suspended for ten days by school authorities for participating in disruptive activities including physical attacks on policemen, a lunch room disturbance, and a school demonstration. The Court held that even though the school administrator who authorized the suspension was present and witnessed the disruptive acts, he could *not* summarily *suspend* the students. Some kind of notice and hearing had to be afforded the students. At 43 U.S.L.W. 4185 the Court said:

> "At the very *minimum*, therefore, students facing *suspension* and the consequent interference with a protected property interest must be given *some* kind of *notice* and *some kind of hearing*. 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' *Baldwin* v. *Hale*, 68 U.S. 223, 233 (1863)." (Emphasis supplied).

The kind of notice and the type of prior hearing afforded the students depends upon the balancing test erroneously applied by the Ninth Circuit to

determine whether a prior hearing is required. As the Court said at page 4185:

> "It also appears from our cases that the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved."

The holdings in *Arnett* and *Goss, supra*, are consistent with the Court's rulings in *Board of Regents v. Roth, supra*, and *Perry v. Sindermann, supra*. In the latter two cases the Court delineated the rights of faculty members at state institutions. All such faculty members who can show a legitimate claim of entitlement to continued employment must be afforded a hearing *before* their property interest in said employment can be terminated. In *Roth* the Court said at pages 569-570:

> "When protected interests are implicated, the right to some kind of *prior* hearing is paramount."

and continued at pages 576-577:

> "Similarly, in the area of public employment, the Court has held that a college professor dismissed from an office held under tenure provisions, *Slochower v. Board of Education*, 350 U.S. 551, and college professors and *staff members dismissed during the terms of their contracts, Wieman v. Updegraff*, 344 U.S. 183, have interests in continued employment that are safeguarded by

> due process. Only last year, the Court held that this principle 'proscribing summary dismissal from public employment without hearing or inquiry required by due process' also applied to a teacher recently hired without tenure or a formal contract, but nontheless with a clearly implied promise of continued employment. *Connell v. Higginbotham*, 403 U.S. 207, 208." (Emphasis supplied).

Since this Court has held that a faculty member and a student have protected interests in the continuation of their status sufficient to prohibit suspension without prior notice and a prior hearing, the Head of a Department of Surgery is entitled to the same due process protection. *Hostrop v. Board Of Junior College District No. 515*, 471 F.2d 488, 494-495 (7th Cir. 1972). Looking at the matter from another perspective, it hardly makes sense for the Constitution to mean that Petitioner's driver's license cannot be suspended by the State of Arizona without affording him a prior due process hearing, *Bell v. Burson, supra*, but that Arizona can lawfully summarily suspend him from a position which is the capstone of an academic career to a surgeon.

Thus, the Circuit Court's decision conflicts with the foregoing decisions of this Court requiring that Petitioner be afforded some kind of notice and some kind of hearing before suspension as Head of the Department of Surgery when, as here, no extraordinary or emergency circumstances exist.

3. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE SEVENTH CIRCUIT IN *HOSTROP V. BOARD OF JUNIOR COLLEGE DISTRICT NO.* 515, 471 F.2d 488, 494-495 (7th Cir. 1972), HOLDING THAT A COLLEGE ADMINISTRATOR HAVING PROTECTED INTERESTS WAS ENTITLED TO NOTICE AND HEARING BEFORE BEING DEPRIVED OF THOSE INTERESTS.

The United States Court of Appeals for the Seventh Circuit, relying upon *Board of Regents v. Roth*, 408 U.S. 564 (1972), held in *Hostrop v. Board Of Junior College District No. 515*, 471 F.2d 488, 494-495 (7th Cir. 1972), that a college administrator who asserted protected interests entitled to due process procedural safeguards was entitled to notice and hearing *before* being deprived of those interests, and that the interests of the state were balanced against those of the administrator only for the purpose of determining the *form* of that *prior* hearing. The opinion stated at 471 F.2d 494-495:

> "Having found that plaintiff has asserted protected interests that are entitled to due process procedural safeguards, we must balance the interests of the state against those of the individual to determine the *form* of hearing that Dr. Hostrop is entitled to *before* his termination. Board of Regents v. Roth, 408 U.S. at 570, 92 S.Ct. 2701, 33 L.Ed.2d 548. The Board's interest consists of maintaining efficiency through the prompt removal of its chief administrator when it reasonably believes that it can

no longer work effectively with and through that person. But it is questionable whether efficiency is a compelling interest, so that this consideration should work to deny a hearing for one college president when courts have rejected it as a rationale for denying hearings to thousands of other employees. *See* Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); Kennedy v. Sanchez, 349 F.Supp. 863 (N.D.Ill.1972). Dr. Hostrop's interests lie in protecting his first amendment rights and future employment prospects and in avoiding dismissal when it is not justified by the facts. We find that the resolution of these interests requires that plaintiff be given a notice of the charges against him, notice of the evidence upon which the charges will be based, a hearing before a tribunal possessing apparent impartiality, and a chance to present witnesses and confront adverse evidence at the hearing. Board of Regents v. Roth, 408 U.S. at 570 n. 7, 92 S.Ct. 2701, 33 L.Ed. 2d 548; Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970); Kennedy v. Sanchez, 349 F.Supp. 863, 865 (N.D. Ill.1972). *See also*, Lucas v. Wisconsin Electric Power Company, 466 F.2d 638, 652 n. 30 (7th Cir. 1972). We recognize that there are

differences between college administrators and teachers so that the Board may have different justifiable grounds for dismissing its president. A court that may be called upon to review the findings of an administrative hearing which results in the discharge of a college president will have to take the particular duties of the president and his working relationship with the school board into account." (Emphasis supplied).

In short, *Hostrop, supra*, conflicts with the Ninth Circuit's decision here that the interests of the state can be balanced against those of the individual to determine *whether* the individual with a protected interest is entitled to a due process hearing *prior* to deprivation of those rights.

4. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN *BOARD OF REGENTS V. ROTH*, 408 U.S. 564, 573 (1972), SETTING FORTH WHAT CONSTITUTES A LIBERTY INTEREST PROTECTED BY THE *FOURTEENTH AMENDMENT*.

Board of Regents v. Roth, 408 U.S. 564, 573 (1972), promulgated at least two tests in determining whether the liberty guaranteed by the *Fourteenth Amendment* was violated in terminating a state employee. They are: (1) whether the termination is based on charges which "might seriously damage . . . [the employee's] standing and

associations in his community" or (2) whether the state, in terminating the employment, "imposed on . . . [the employee] a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities." The Court gave, as one illustration of the first test, the case where the employee was charged with dishonesty or immorality, and illustrated the second test by citing the example of the state invoking regulations barring the employee from public employment in state universities.

Here the Ninth Circuit applied only the first of these two tests, applied it incorrectly by testing it only against the single example thereof of a charge of dishonesty or immorality, and erroneously concluded therefrom that Petitioner's liberty interests were not imparred here.[13] Had the Ninth Circuit proceeded either to apply the first test properly or the second test of whether the suspension as Head imposed a stigma or other disability that foreclosed Petitioner's freedom to take advantage of other employment opportunities as a Head of a Department of Surgery, its own findings would have required a ruling that Petitioner's liberty interests were implicated.

For example, the Circuit Court's opinion expressly stated:

(1) "We recognize that the suspension probably does adversely reflect on appellant."

(2) "Perhaps a suggestion of incompetence does result."

Hence, under the second or stigma test, Petitioner's liberty interest was implicated under the Ninth

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13 Appendix B, pages A-22 to A-23.

Circuit's own findings. Furthermore, the District Court conceded that "plaintiff has received no offers of employment from other universities as head of a department . . . during the pendency of this controversy," and "[i]ndeed, it is not likely that plaintiff will receive such offers until this dispute is brought to a final resolution."[14] Petitioner's freedom to take advantage of other employment opportunities as Head of a Department of Surgery were foreclosed as a result of the stigma cast on his professional reputation as a Head.

Also, the proper application of the first test - the damage to the employee's standing and associations in his community standard - to the Ninth Circuit's findings requires a conclusion that Petitioner's liberty interest was implicated. The Ninth Circuit, although carefully noting in footnote 5, that it did not even wish to intimate that Petitioner in fact refused to perform tasks assigned by the administration or that his lack of cooperation ever damaged either the medical school or the hospital, did thereby affirm its view that Petitioner had not "cooperated" with the administrators as it implied a department head should. Hence, a charge of lack of cooperation was made against Petitioner in his capacity as Head of the Department of Surgery. Assuming arguendo that the Circuit Court was correct in its assumption that it is the primary function of the chief representative of the department faculty, the department head, to "cooperate" verbally with the University administration, *Schell v. Board of Trustees*, Civil Action No. 4673 (D. Del. July 31, 1973) at 44-45, ruled that dismissal of an educator for insubordination constituted a stigma within the meaning of *Roth*. Dismissal for insubordination "could result" in a stigma foreclosing other employment opportunities. *Stout v. Whiteaker*, 379 F. Supp. 218, 221 (M.D. Tenn.

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14 Appendix A, page A-8.

1973) (dictum). A teacher's services discontinued after a rating of "unprofessional attitude" was applied involved reputation and good name as a teacher and fall within the meaning of liberty under *Roth*. It is enough that the stigmatizing charges "do reach those, or can reach those, who are interested in the plaintiff's professional reputation." *Suarez v. Weaver*, 484 F.2d 678, 680 (7th Cir. 1973).

Thus, the Court of Appeals' decision that Petitioner's liberty interests were not implicated is in conflict with the principles set forth in *Board of Regents v. Roth, supra*. Also, under its own final sentence that upon intrusion on a liberty interest, a pre-deprivation hearing may be required, the Circuit Court's ruling conflicts with this Court's decision.

5. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES IN *ARNETT V. KENNEDY*, 416 U.S. 134 (1974); *GOLDBERG V. KELLY*, 397 U.S. 254 (1970); AND *IN RE MURCHISON*, 349 U.S. 133 (1955), RELATING TO THE ELEMENTS OF PROCEDURAL DUE PROCESS REQUIRED BY THE *FOURTEENTH AMENDMENT* FOR A DUE PROCESS HEARING.

The Ninth Circuit's ruling, relying on *Arnett*, rested on the assumption that the hearing Petitioner would receive at the University would comport with the *Fourteenth Amendment's* requirements for a fair hearing. Three of the concurring Justices stated in *Arnett v. Kennedy*, 416 U.S. 134 (1974), that the thirty day notice and minimal hearing provisions of the *Lloyd-LaFollette Act*, 5 *U.S.C.*

§ 7501, were constitutionally sufficient *only* because full evidentiary hearings were provided following a termination. Read together with the three dissents written in *Arnett*, it is clear that at least six Justices agreed that a full evidentiary hearing was required before a final deprivation could occur and that having such a full hearing immediately after a dismissal from one's job was the only reason minimal notice and hearing provisions were permissible prior to termination. However, the procedures outlined in the *Faculty Manual* § VIII relating to dismissal of tenured faculty members do not meet the requirements of the *Fourteenth Amendment*, and therefore the District Court's Order of May 7, 1974 violates Petitioner's right to a hearing which comports with the requirement of due process.

The reasons why the administrative procedures for a dismissal hearing of a tenured faculty member at the University of Arizona do not meet the standards of procedural due process are as follows:

1. Procedural due process requires a decision by a fair and impartial tribunal. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *In re Murchison*, 349 U.S. 133 (1955) (an "impartial decision maker is essential"); *Simard v. Board of Education of Town of Groton*, 473 F.2d 988 (2d Cir. 1973); *Ferguson v. Thomas*, 430 F.2d 852, 856 (5th Cir. 1970); *Lusk v. Estes*, 361 F. Supp. 653 (N.D. Tx. 1973); *Kennedy v. Sanchez*, 349 F. Supp. 863, 865 (N.D. Ill. 1972). An impartial tribunal is the most important and basic element of procedural due process since "[a]ny other collateral procedural guarantees are largely without meaning if the deciding tribunal has in some way adversely prejudged the merits of the case." *Simard, supra*, at 993.

Here the Committee on Academic Privilege and Tenure cannot be an impartial tribunal because

one of the three members is appointed by the University President, the person who dismissed Petitioner, and whose bias and prejudice was conceded at the preliminary injunction hearing herein when he stated that Petitioner did not deserve a hearing. Respondent's appointee, the President's appointee, along with the other member, then choose a third member giving the University President, whose decision is being appealed from, an equal voice on the Committee.

2. Next, due process requires a hearing before a tribunal with the power to render a decision which is effective. Here, the hearing by the Committee on Academic Privilege and Tenure is nothing more than a "recommendation" by the Committee to the University President who testified it was not binding on him and that he would not adopt it if Petitioner's reinstatement as Head was proposed by the Committee.

3. Procedural due process requires that the notice of charges be sufficiently detailed to permit the individual to adequately respond. *Whitney v. Board of Regents of University of Wis.*, 355 F. Supp. 321, 324 (E.D. Wis. 1973); *Wagner v. Little Rock School District*, No. CR-72-C-59 (E.D. Ark. Sept. 17, 1973); *Lafferty v. Carter*, 310 F. Supp. 465 (W.D. Wis. 1970). The provisions governing a hearing before the Committee on Academic Privilege and Tenure do not require that the faculty member whose dismissal is recommended be supplied with charges detailed enough to make effective refutation possible. It is not required by the Faculty Manual that Petitioner be furnished with a list of charges sufficiently detailed enough to enable Petitioner or his counsel to make intelligent decisions or adequate investigations concerning his defense.

4. Procedural due process requires that the individual with a protected interest be given notice,

in advance of the hearing, of the names of the witnesses against him and the nature of their testimony. *Hostrop v. Board Of Junior College District No. 515*, 471 F.2d 488, 495 (7th Cir. 1972); *Ferguson v. Thomas*, 430 F.2d 852, 856 (5th Cir. 1970); *Lusk v. Estes*, 361 F. Supp. 653 (N.D. Tx. 1973); *Whitney v. Board of Regents of University of Wis.*, 355 F. Supp. 321, 324 (E.D. Wis. 1973). In order to make a person's "opportunity to refute charges meaningful he must be told their source." *Whitney, supra*, at 324.

The Committee on Academic Privilege and Tenure is required only to furnish the faculty member whose dismissal is proposed with a list of the witnesses, not the nature of their testimony. Thus, Petitioner and his counsel cannot know until the time of his hearing what charges are being made against him by each of the proposed witnesses.

5. Another minimum requirement of procedural due process is the right to cross-examine those who have provided adverse information upon which the charges are based. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 367-368 (1970); *McNeil v. Butz*, 480 F.2d 314, 322, 325 (4th Cir. 1973); *Hostrop v. Board Of Junior College District No. 515*, 471 F.2d 488, 495 (7th Cir. 1972); *Sindermann v. Perry*, 430 F.2d 939, 944 (5th Cir. 1970); *Moore v. Gaston County Board of Education*, 357 F. Supp. 1037, 1041 (W.D. N.C. 1973); *Whitney v. Board of Regents of University of Wis.*, 355 F. Supp. 321, 325 (E.D. Wis. 1973).

However, the rules governing hearings held by the Committee on Academic Privilege and Tenure provide that: "The chairman *shall* initiate and ask questions of the witnesses. *All* questions of the witnesses, regardless of source, *shall* be asked through the chairman, or shall be directed at his discretion." Hence, neither Petitioner nor his

counsel has the right to cross-examine those witnesses who have provided adverse information upon which the charges are based.

6. Also, procedural due process requires an open hearing. *Fitzgerald* v. *Hampton*, 467 F.2d 755 (D.C. Cir. 1972).

The rules governing hearings held by the Committee on Academic Privilege and Tenure make no provision for an open hearing.

The foregoing show that even if a person with an interest protected by the *Fourteenth Amendment* could be deprived of that interest without prior notice and a pre-suspension hearing, the hearings of the Committee on Academic Privilege and Tenure do not comply with the notions of fair play and essential justice that procedural due process contemplates. *Hannah* v. *Larche*, 363 U.S. 420 (1960); *Greene* v. *McElroy*, 360 U.S. 474 (1959).

6. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE DUE PROCESS RIGHTS OF THOSE EDUCATORS WHOSE FUNCTION WITHIN A PUBLIC EDUCATIONAL INSTITUTION IS TO ARTICULATE NOT ONLY THEIR OWN VIEWS ON EDUCATIONAL PHILOSOPHY BUT THOSE OF THE DEPARTMENT FACULTY EACH REPRESENTS.

Petitioner is a world renowned academician and surgeon. Presumably that is why he was sought by the University of Arizona, and was able to develop what the University President stated was

a "very strong academic unit that is attracting national attention." Such a man and such a department faculty which he served as chief representative within the institution cannot progress in the natural sciences without the safeguards of academic freedom. His and their words as to the educational philosophy which should be applied in the running of a medical school cannot be infringed upon or deterred or punished if the *First Amendment* is to be applied. Political power can no more suspend such Department Head without prior notice and hearing *solely* for differences of opinion than it could terminate him or the department faculty for such reason.

A state university is not a military organization whose function is to impose the will of its government. It educates and searches for the truth. Hence, the Head of a Department of Surgery, the chief representative of the department faculty within the institution, cannot be suspended under the *First Amendment* solely for words which express his and the department's opinions as to how the medical school should be operated. The Circuit Court expressly ruled that it did not even wish to intimate that Petitioner ever refused to perform tasks assigned by the University administration or that his differences of opinion ever damaged either the medical school or the University. Thus, the loyalty and cooperation relied on by the Ninth Circuit to deny Petitioner a pre-suspension hearing are, in such a context, synonyms for orthodoxy, and it is only one step from there to the genetic theories of Lysenko.

How a medical school is administered or how it is to be operated is simply the expression of educational philosophy about which all faculties differ. If the *First Amendment* does not protect the right of a Department of Surgery faculty and its Head to verbalize the former's educational philosophy under circumstances where such Head performs

all tasks assigned by the University administration and such differences of opinion never damaged the medical school or the University, its protective umbrella has a hole too huge to make it worthy of the name. To rule that expression of educational views alone are a "potential threat" to the University and that such a potential threat is sufficient to deny the faculty's chief representative a *Fourteenth Amendment* pre-suspension hearing is to conclude that administrators do more than administrate, they proclaim and enforce dogma.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ERLE E. PEACOCK, JR., Plaintiff, v. BOARD OF REGENTS OF THE UNIVERSITIES AND STATE COLLEGE OF ARIZONA; et al., Defendants.	No. CIV 74-123 PHX-HBT ORDER RE PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

This action was instituted by Dr. Earl Peacock, Jr. for money damages and equitable relief against the above named defendants. The suit stems from the termination of Dr. Peacock as Head of the Department of Surgery, College of Medicine, University of Arizona, on October 25, 1973, and his subsequent suspension as Professor of Surgery on February 11, 1974.

Pending trial on the merits, plaintiff has asked this court for a preliminary injunction ordering his immediate reinstatement as Head and Professor of Surgery at the College of Medicine.

I. Jurisdiction

Plaintiff bases federal jurisdiction on 28 U.S.C. §1331 (Federal question) and 28 U.S.C.

§1343(3) and (4) (Civil rights). The causes of action are alleged to arise under 42 U.S.C. §1983 and the First and Fourteenth Amendments to the Constitution. The matter in controversy is alleged to exceed $10,000.

Defendants have interposed a jurisdictional objection with respect to defendant Board of Regents. Defense counsel argues that the Board of Regents is not a proper defendant under §1983 and that the United States Constitution does not specifically provide anyone with a right of action absent reference to the Civil Rights Act of 1871, 42 U.S.C. §1981 et seq.

For the purposes of this order, and in view of the fact that this court has jurisdiction over the Regents themselves, both as individuals and in their representative capacities, Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969) and also in light of City of Kenosha v. Bruno, 412 U.S. 507 (1973), this court decides that jurisdiction over the Board of Regents is properly averred under 28 U.S.C. §1331.

II. Brief history

Prior to joining the University of Arizona's faculty, Dr. Peacock was Professor of Surgery at the University of North Carolina. During 1968 plaintiff was persuaded by Dr. DuVal, a former acquaintance, to join the medical faculty at the University of Arizona as professor of surgery and to establish and head a department of surgery.

After arriving at the University of Arizona in early 1969, plaintiff recruited outstanding surgeons to join him, and he organized what is generally recognized as a unique and innovative academic and clinical program at the College of Medicine.

In April 1972, plaintiff received his first

written notice that his performance as Head was less than satisfactory. Dr. DuVal, as Dean of the College of Medicine, wrote that certain actions taken by plaintiff appeared to reflect an attitude that the Department of Surgery's welfare took precedence over that of the College of Medicine. Dr. DuVal further indicated that if such interpretation were correct then those actions were a "serious breach and overextension. . .of responsibilities" and would substantially undermine the confidence that Dr. DuVal had had in plaintiff.

Matters drifted until May 11, 1973, when Dr. DuVal returned to the University campus from an assignment in Washington, D.C. He was immediately apprised of a report made by the Liaison Committee of the Association of American Medical Colleges and the American Medical Association* which was critical of the operation of the department of surgery. Dr. DuVal at that time asked Dr. Peacock to resign as Head of the Department of Surgery. Over the next several weeks Dr. DuVal and Dr. Peacock conferred as to how this could be most satisfactorily accomplished from Dr. Peacock's point of view. During these discussions Dr. DuVal repeatedly told plaintiff that the request for resignation in no way reflected on his excellence as a surgeon, instructor and researcher, but rather was required because of his inability to work harmoniously and cooperatively with his fellow heads at the College of Medicine. It should be noted that these discussions were on a very personal and confidential basis. Despite the dissatisfaction with the

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*The Association of American Medical Colleges and the American Medical Association jointly participate in the accreditation of schools of medicine through the agency of the Liaison Committee which consists of six representatives from each of the Association's councils, two "public" members, and one representative of the Federal government.

plaintiff's performance as Head, and during the negotiations regarding the time and manner of termination, the University renewed the plaintiff's contract as Professor and Head of the Department of Surgery through June 30, 1974.

In the months leading up to the dismissal, the parties continued to engage in dialogue regarding the problems presented by Dr. Peacock's continuation as Head and regarding the least painful way of securing a "transition" in the leadership of the Department. Finally, convinced that Dr. Peacock would not resign, the University dismissed plaintiff without notice and hearing as Head of the Department of Surgery on October 25, 1973.

Between October 25 and January 31, 1974, Dr. DuVal acted as Head of the Department of Surgery. Although meetings were called to generate support for plaintiff, the school and the department functioned in an acceptable manner. However, during these months lines were drawn, and statements were made that reduced the chances of peaceful resolution. Repeatedly, Dr. DuVal had to defend and explain publicly the actions of the Administration. Plaintiff, on the other hand, orchestrated an effort, both within and without the walls of the campus, to win his reinstatement. Significantly, on December 5, 1973, the University offered plaintiff (although maintaining that he had no right to it) a hearing to determine the justness of its decision to terminate. Plaintiff ignored this offer.

On January 31, 1974, defendant Dr. Lindsey was appointed as Acting Head of the Department of Surgery, and what had before been a simmering yet containable conflict erputed (sic) into a bold contest of authority. On the basis of the record thus far it is not evident to what extent plaintiff was responsible for the contempt and disrespect which greeted Dr. Lindsey on his assuming the position as Acting Head. It is clear, however, that plaintiff

enjoyed immense loyalty within the Department and that a considerable amount of tension would have existed without any effort on plaintiff's part.

Following Dr. Lindsey's appointment, the atmosphere in the Department, as characterized by the defendants in their testimony, was "tense and explosive." While such a description may be overdrawn, it appears to this court that the Department was in a state of turbulence and that its ability to carry out its educational functions was substantially impaired.

Faced with this situation, the Administration decided that two competing centers of authority and allegiance could not exist within the Department. Consequently, upon the recommendation of both Drs. Lindsey and DuVal, the Administration suspended plaintiff, with pay, as Professor of Surgery and informed him of the manner in which to set in motion the available grievance procedures.

III. Preliminary Injunction

In view of the plaintiff's contentions, it is imperative that this court state what this case does not involve. It does not involve academic freedom. Bickering and disputes between heads of departments is not protected speech within the First Amendment. Plaintiff directed the Department of Surgery in apparent disregard of the interest and well-being of other departments. He applied for funds independently rather than jointly in those areas where departmental jurisdiction overlapped. He acted to increase the number of patients for the Department of Surgery without consulting other department heads and with little care that other departments were being deprived of patients. Upon dismissal as Head, plaintiff acted to seize and retain the authority of Department Head. The verbalization of aggressive conduct does not bring plaintiff within the safe harbor of the First Amendment.

Watts v. Bd. of Curators, University of Mo., 363 F.Supp. 883 (W.D. Mo. 1973). A university has the right to expect a professor to follow instructions and to work cooperatively and harmoniously with other members of the faculty. Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972).

This case does not involve the extent to which democratic principles are relevant in academe. Plaintiff argues that a department head is a representative of the department faculty and as such must be accountable to, and only to, that constitutency. While such a university organization could be defensible as a matter of educational policy, it does not appear to be required either by the Constitution or any statute. The character or nature of department head is not a matter for this court to decide, rather it is a matter to be left to collective bargaining and private persuasion.

The main issues are:

1. Whether the plaintiff has an interest protected by due process either as Head or Professor,

2. Whether due process requires a pretermination or presuspension hearing, and

3. If so, whether reinstatement is the only relief available.

Before a preliminary injunction can be granted, it is incumbent upon a court to consider four factors:

1. The threat of irreparable harm to plaintiff if the injunction is not granted;

2. The injury that granting the injunction would inflict on the opposing party;

3. The probability that petitioner will succeed on the merits at subsequent trial; and

4. The larger public interest.

Ross-Whitney Corp. v. Smith Kline & French Labs., 207 F.2d 190 (9th Cir. 1953); Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970), aff'm on other grounds 405 U.S. 727 (1972); Yakus v. U.S., 321 U.S. 414 (1944).

In analyzing plaintiff's contentions that he was deprived of both liberty and property without due process of law by his termination as Head and suspension as Professor, the two acts will be separately treated.

A. Headship

1. Liberty interest

Plaintiff alleges a violation of a protected liberty interest in the manner in which his employment as Head was terminated. Liberty as protected by the Fourteenth Amendment is "not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life. . .and generally to enjoy those privileges long recognized. . .as essential to the orderly pursuit of happiness by free men." Board of Regents v. Roth, 408 U.S. 564, 572 (1972) quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

Attaching a badge of infamy is a restraint of liberty. Plaintiff, however, was never accused of any serious delinquency or charged with unsavory character traits such as dishonesty or immorality. In no way has plaintiff's good name or reputation, honor or integrity been impugned by defendants. The University and witnesses testifying in this motion expressed nothing but admiration and

respect for Dr. Peacock. "Brilliant" and "outstanding" were adjectives frequently used by the witnesses in this case when describing plaintiff as a teacher, surgeon and person.

Future employment has not been foreclosed plaintiff, though it is understandable that plaintiff has received no offers of employment from other universities as head of a department or professor of surgery during the pendency of this controversy. Indeed, it is not likely that plaintiff will receive such offers until this dispute is brought to a final resolution.

On the state of the record, plaintiff has failed to show that his dismissal as Head of the Department of Surgery violated any protected interest in "liberty."

2. Property interest

Plaintiff alleges a property interest in his employment as Head on various grounds. First, that he has an interest secured by a contract with the University. Second, he contends that his expectancy was of employment as head for 6-10 years since that was the period of time that he and Dr. DuVal estimated as necessary to fully establish the Department of Surgery. Third, plaintiff argues that the method commonly used at the University to select heads, i.e. faculty consultation, created in heads so selected a protected interest.

Defendants, on the other hand, argue that headships are administrative positions; that heads serve at the pleasure of the Administration and their dismissal must remain within the Administration's unfettered discretion. Further, defendants claim that it is the "common law of the campus," Perry v. Sindermann, 408 U.S. 593 (1972), that heads serve at the pleasure of the University.

This court rejects plaintiff's contention that the 6-10 year time period discussed during preliminary negotiations preceding his arrival at the University constitutes a protected expectancy. Plaintiff was not given a contract to establish the Department of Surgery; rather he was employed as head on a year-by-year basis. While it is true that plaintiff gave up a rewarding and comfortable position at the University of North Carolina to come to Arizona, such conduct merely indicates plaintiff's confidence in his abilities and his subjective expectancy that all would proceed well in Arizona. Such a subjective expectancy is not a "legitimate claim of entitlement" as required by Roth, supra, before due process protections apply.

Next this court rejects plaintiff's argument that the method of selection of heads usually used at the University of Arizona vested in plaintiff a protected property right. The fact that plaintiff has departmental faculty support, the extent of which is a matter of some dispute, does not constitute a legitimate claim of entitlement to the headship.

If plaintiff is to have a protected property interest in his position as Head of the Department of Surgery, it must come from his written contract of employment or appointment for the year beginning July 1, 1973, and ending June 30, 1974. A term of employment set by contract has been recognized as a property interest which the state cannot extinguish without conforming to the dictates of procedural due process. Weiman v. Updegraff, 344 U.S. 183 (1952); Roth, supra; Hostrop v. Bd. of Junior College Dist. No. 515 etc. Ill., 471 F.2d 488 (7th Cir. 1972).

The document entitled "Notice of Appointment" secured plaintiff's service as both Professor and Head for the academic year 1973. It stated the compensation plaintiff was to receive, and it

required acceptance by the plaintiff. It would be anomalous to accept that plaintiff was under contract as Professor but that his employment as Head was at the will of the Administration. It appears to this court's satisfaction that the notice was in effect a contract and that plaintiff had a protected property interest in his employment as Head for the 1973 academic year.

3. Relief

"Once it is determined that due process applies, the question remains what process is due . . .[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471 (1972). The character of the relief may depend on the importance of what the plaintiff stands to lose. Thorpe v. Housing Authority, 386 U.S. 670 (1967).

It is well settled that, absent special circumstances, due process requires that one who is deprived of a protected interest be given a hearing prior to the deprivation. Roth, supra; Skehan v. Bd. of Trustee of Bloomsberg St. Col., 358 F. Supp. 430 (M.D.Pa. 1973).

Nothing in the record indicates that as of the date of plaintiff's dismissal as head of the department, special or extraordinary circumstances required that plaintiff be dismissed without a prior hearing. Certainly the facts are far removed from those existing in Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961).

Nevertheless, plaintiff's protected interest is of short duration and he has not suffered any loss or reduction in pay. While this court cannot say that it would be futile to order a due process hearing, Kota v. Little, 473 F.2d 1 (4th Cir. 1973), it does appear that the dispute is so intractable,

Zimmerer v. Spencer, 485 F.2d 176 (5th Cir. 1973) and the threat to the University's normal functioning so great, Lucia v. Duggan, 303 F. Supp. 112 (D.Mass. 1969), that to order full reinstatement would be an impurdent use of this court's equitable power.

4. Order

The University of Arizona is ordered to reinstate plaintiff as Head of the Department of Surgery but may at its option relieve him from performing any duties as head pending a hearing in accordance with the rules and regulations, Faculty Manual, Chap. VIII 13 ed., regarding the dismissal of tenured* faculty members.

B. Professorship

1. Property and liberty interest

It is so clear as to require no citation to authority that a tenured professor has a protected property interest. Plaintiff was a tenured professor when he was suspended with pay as Professor of Surgery on February 11, 1974. This court agrees with Lafferty v. Carter, 310 F.Supp. 463 (W.D. Wisc. 1970) that when a professor is separated from the mainstream of his occupation, most especially a surgeon for whom frequent practice is vital, the consequences are major even though not measurable in financial terms. Therefore, the fact that plaintiff has suffered no immediate financial loss in no way defeats the requirement that due

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*There is in Arizona no tenure in a strict legal sense but this court uses it here to refer to what under Arizona law is designated as "continuing" appointments. Throughout this order, "tenure" will be used in the Arizona sense unless otherwise stated.

process i.e. rudimentary fairness, apply.

For reasons previously stated and equally valid with respect to the professorship, this court decides that no liberty interest was violated and no badge of infamy attached by defendants' suspension of plaintiff.

The question before this court is whether defendants denied plaintiff due process by failing to afford him a due process hearing before suspending him as professor.

2. Prior hearing

Due process requires a hearing prior to a deprivation of a protected interest absent extraordinary circumstances.* Defendants maintain that following Dr. Lindsey's appointment on January 31, 1974, several incidents occurred which created a "tense and explosive" atmosphere within the Department of Surgery, and required that the University act in a summary fashion. Among other disturbing events disclosed in the record, Dr. Lindsey was prevented from presiding, as he was entitled to as head, over a departmental meeting; conferences scheduled in one room by Dr. Lindsey were moved to other rooms either by plaintiff or his supporters. All of this was against a backdrop which included contacting the leading candidate for the College's deanship in an effort either to win

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*Cafeteria Workers, supra, is the leading case regarding the "special circumstances" test, and although it has suffered recent criticism, see McNeil v. Butz, 480 F.2d 314 (4th Cir. 1973), it has a residual vitality as attested to by Olson v. Regents of the University of Minnesota, 301 F. Supp. 1356 (D.Minn. 1969) and Moore v. Knowles, 333 F.Supp. 53 (N.D. Tex. 1971), rev'd on other grounds, 466 F.2d 531 (5th Cir. 1972).

his support or to obstruct his employment as dean and meetings in which various of the plaintiff's supporters were delegated tasks of approaching various publics, e.g. Senator Goldwater, to intercede on plaintiff's behalf.

As a result there was no specification of charges, no advance notice and no hearing preceding plaintiff's suspension. The University did, however, inform plaintiff that redress was available through the procedures set out in the Faculty Manual and that a hearing would be provided upon request. Plaintiff has thus far failed unequivocally to accept the University's offer arguing that the hearing must precede the suspension.

There are limitations on the kind of action the University can take, even in an emergency situation. It must adequately respond to the emergency in the manner least intrusive on the plaintiff's rights. Even if defendants violated due process in not tailoring the intrusion to the situation on campus, this court would not order the relief requested because the good accomplished by reinstatement would be outweighed by the harm done to the University Hospital.* A hospital is a finely balanced mechanism and surgery requires an unusual degree of cooperation and loyalty among the members of the surgical team. The conflict between the parties has escalated to the point that it is clear that it would be most difficult for plaintiff to fully reintegrate himself into the workings of the hospital unless through the mutual agreement of the parties.

3. Order

It is, therefore, ordered that the University

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* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951).

continue effective its offer to plaintiff to hold a hearing regarding his status as Professor in accordance with the University's rules and regulations.

Plaintiff shall have ten days from the date of this order to request a hearing in accordance with the prescribed procedure of the University of Arizona. The University shall afford plaintiff such hearing within ten days of receipt of such request, unless the parties mutually agree as to a continuance thereof.

DATED: May 3, 1974.

/s/ Howard B. Turrentine
Howard B. Turrentine, Judge
United States District Court

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERLE E. PEACOCK, JR.,

Plaintiff-Appellant,

vs.

BOARD OF REGENTS OF THE UNIVERSITIES AND STATE COLLEGES OF ARIZONA; JACK R. WILLIAMS, WELDON P. SHOFSTALL; PAUL L. SINGER, SIDNEY S. WOODS, GORDON D. PARIS, JAMES E. DUNSEATH, MARGARET M. CHRISTY, KENNETH G. BENTSON, RALPH M. BILBY and RUDY E. CAMPBELL, each of the foregoing individually and in his or her capacity as a member of the Board of Regents of the Universities and State College of Arizona; JOHN LENTZ and NORMAN SHARBER, each individually and in his capacity as President of the University of Arizona (sic); MERLIN K. DUVAL, individually and in his capacity as Vice President for Health Sciences and Acting Dean of the College of Medicine, University of Arizona; and DOUGLAS H. LINDSEY, individually and in his capacity as Acting Head of the Department of Surgery, College of Medicine, University of

No. 74-2259

OPINION

Arizona,)
)
Defendants-Appellees.)
)

Appeal from the United States District Court
for the District of Arizona

Before: LUMBARD,* KOELSCH and WRIGHT,
Circuit Judges.

KOELSCH, Circuit Judge:

Erle E. Peacock, Jr., appeals from an order of the district court granting him a preliminary injunction but for less than all the relief he sought. Our jurisdiction is predicated upon 28 U.S.C. §1292(a).

From 1969 until late in 1973, appellant was a tenured Professor of Surgery and Head of the Department of Surgery at the University of Arizona's College of Medicine, a state school. He was employed under a written contract which during the events here in issue appointed him "Professor and Department Head in the Department of Surgery" "for the fiscal year 1973-1974 effective July 1, 1973. . . ." The University, however, became dissatisfied with his administrative performance, and on October 25, 1972 (sic), summarily dismissed him as Head of the Department. An academic power struggle ensued, with further strife and bickering, during which, on February 11, 1974, the University suspended appellant as Professor of Surgery, again without a prior hearing, although in this regard offering him a post-suspension

*The Honorable J. Edward Lumbard, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

hearing on his status as professor.

On February 22, 1974, appellant instituted this suit for damages and equitable relief to redress the denial of his right, allegedly protected by the Due Process Clause, to a hearing prior to being deprived by the State of his protected property interests -- his position as Head of the Department and his position as professor, both held under contract. See Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972). Appellant also moved for a preliminary injunction reinstating him as Head of the Department, and removing his suspension as professor, until such time as the University afforded him a pre-deprivation hearing.

Ruling on the motion, the district court concluded with respect to the "headship" that appellant had a property interest in the position -- a legitimate claim of entitlement of a year's duration created by the appointment papers -- and that no circumstances existed warranting deprivation of that interest absent a hearing. However, the court declined to exercise its equitable powers to order full reinstatement. Instead, the court ordered the University to reinstate him as Head with the option of "reliev[ing] him from performing any duties as head pending a hearing in accordance with the rules and regulations, Faculty Manual, Chap. VIII 13 ed., regarding the dismissal of tenured faculty members." With respect to the professorship, the court likewise ruled that appellant had a cognizable property interest, and that his suspension without a hearing probably violated due process, but again refused to order reinstatement. It ordered the University to continue effective the offer to a post-suspension hearing.

Initially, appellant's appeal was from both aspects of the Court's order. However, he has now advised us that during its pendency the University

has reinstated appellant as professor. Accordingly, the parties stipulated that the portion of the court's order refusing to reinstate appellant as professor is no longer in issue and is withdrawn from the appeal. However, the question of the propriety of the order as it relates to appellant's reinstatement as Head of the Department remains.[1]

Appellant contends, in substance: (1) that he possessed a property interest in the position as Head of the Department for a one-year term (ending June 30, 1974, eight and one-half months after he was dismissed); (2) that due process entitled him to a pre-deprivation hearing; (3) that the district court erred in refusing to order full reinstatement because it is as a matter of law an abuse of discretion to balance rights of a constitutional dimension against the state's interest in denying those rights, see Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569, 576 (D. D.C. 1952); and, (4) that this court must remedy the district court's error now by ordering appellant's reinstatement, even though his contractual appointment has expired while the case was pending on appeal.[2] The University takes the position that a headship does not constitute a protected property interest; it argues (and submits a number of supporting affidavits) that the position is quasi-administrative, that under the common law of the campus (see Perry v. Sinderman, supra) the heads of departments are appointed by and serve at sufferance of the University President, that they can attain no tenure in the position, and that they are subject to the unfettered discretion of the President, who can dismiss department heads at any time and for any reason or for no reason.

As noted, the district court found that appellant had a "legitimate claim of entitlement" created by his one-year appointment -- an interest of the sort protected under Perry v. Sinderman,

supra. We think there is a great deal of merit in the University's contention that the contractual appointment should be read as merely delimiting the term during which appellant was to serve at sufferance, see Adams v. Walker, 492 F.2d 1003, 1007 (7th Cir. 1974), and that, as the position was terminable at will, he had no protected interest in it.

> "Although comprehensive definition of the entitlement concept is not yet possible, the contexts in which prior notice and hearing have or have not been required provide guidance in determining the kinds of interests that are entitlements. An interest that gives rise to an entitlement is always a conditional interest, but not all conditional interests in governmental benefits give rise to entitlements. To create an entitlement, the law must remove the decision to grant the benefit from agency discretion. (See, e.g., Arnett v. Kennedy (1974) ___ U.S. ___, at ___ (op'n of White, J.) [42 U.S.L.W. 4513, 4535] (government employment terminable at will of government not subject to prior notice and hearing).)"

Geneva Towers Tenants Organization, etc., et al. v. Federated Mortgage Investors, Inc., et al., No. 72-2238 (9th Cir., October 2, 1974), slip opinion at 17 (Hufstedler, J., dissenting). See Board of Regents v. Roth, supra, at 578. However, in the present posture of the case, before a complete record has been developed at a trial on the merits, we are unwilling to hold that the district court's conclusion about the nature of the position was clearly erroneous.

Nevertheless, assuming that appellant had

a protected expectation of employment, we think the district court's order afforded him his due process rights. The University, as noted, did not provide appellant a hearing either before or after dismissing him as Head. The effect of the court's order reinstating appellant to the position but granting the University the option of suspending him from his duties pending a hearing was precisely the same as a ruling that the University action violated due process but that a hearing following a summary suspension was an adequate procedure. We think that under the circumstances of this case, due process does not require a pre-suspension hearing, and that the district court's order declining to completely reinstate appellant pending such a hearing was proper.[3/]

As we recently recognized:

> "The Supreme Court, in Goldberg v. Kelly, 397 U.S. 254 (1970), enunciated a two-step process for analyzing cases involving deprivation of a governmental benefit. First, it must be ascertained whether the interest at issue is a constitutionally protected 'property' or 'liberty' interest. See id. at 262. Second, if the interest is a protected one, the beneficiary's interest in avoiding loss must be balanced against the government's interest in summary adjudication." Geneva Towers, supra, slip opinion at 8. (Footnotes omitted.)

To amplify the second point -- "Once it is determined that due process applies, the question remains what process is due . . . [D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Notice and opportunity to be heard "must be granted at a

meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). To determine whether the opportunity to be heard provided was at a time sufficiently meaningful to satisfy due process, we must balance the University's interest in the form of procedure ultimately afforded appellant by the court against appellant's interests in a more rigorous procedure. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 262 et seq. (1970); Geneva Towers, supra, at 8, 13, 14-15. See Note, The Supreme Court, 1973 Term, 88 Harv. L. Rev. 13, 77, 85 (1974).

Appellant contends that absent exceptional circumstances (none of which here exists) the outcome of that traditional due process balancing test is presumptively weighted in favor of a prior hearing. He cites several cases to support his position -- Fuentes v. Shevin, 407 U.S. 67, 82 (1972); Bell v. Burson, 402 U.S. 535, 542 (1971); Goldberg v. Kelly, 397 U.S. 254, 259-260, 264 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337, 339, 342 (1969) -- which, particularly Fuentes, indeed support his contention. See also Board of Regents v. Roth, supra, at 570 n.7. Before the Court's decisions last term in Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), and Arnett v. Kennedy, 416 U.S. 134 (1974), we might have agreed. See Geneva Towers, supra, at 14; Stewart v. Pearce, 484 F.2d 1031 (9th Cir. 1973). However, in Mitchell a majority of the Court applied the traditional balancing test unaided by a presumption in favor of a prior hearing and upheld a sequestration statute which provided only a post-seizure hearing. And in Arnett the Court upheld the OEO's employee dismissal procedures, under the Lloyd-LaFollette Act, 5 U.S.C. §7501, even though the procedures provide a trial-type hearing only after termination. Three members of the Court explicitly applied a balancing test to reach the conclusion that a hearing post-removal was adequate, see 416 U.S. at 167-168 (opinion of Powell, J., with

which Blackmun, J., concurred), and 416 U.S. at 188 (opinion of White, J.); and the plurality, two members of which joined in the Mitchell majority, went further to hold that the defined removal procedures limit a claim of entitlement created by the state as much as a substantive limit, and that adherence to those procedures satisfies due process.[4/] We think the upshot of Arnett and Mitchell is that in considering the due process validity of the procedure provided we must apply the traditional balancing test without a presumption favoring a prior hearing.

So applying the test, we conclude that the procedure provided by the district court comported with due process. Appellant's interest in a hearing before rather than after he was suspended from the performance of his duties as Head of the Department was relatively slight. No financial interest is involved -- the position was not renumerated, and appellant continued to receive his full professor's pay while suspended. Clearly appellant was not threatened with the spectre of brutal need which would dictate the necessity of a prior hearing. Compare Goldberg v. Kelly, supra (welfare benefits); Sniadach, supra (wage garnishment); Geneva Towers, supra (rent increases). The suspension pending a hearing did not impair appellant's liberty interests, see Board of Regents v. Roth, supra, at 573, as the proposed termination was not for any reason which might stigmatize appellant in the way that a charge of dishonesty or immorality might.

We recognize that the suspension probably does adversely reflect on appellant. The prestige that attached to the holding of the position, and whatever lustre it added to appellant's reputation as a doctor, may incidentally be temporarily diminished. Perhaps a suggestion of incompetence does result, even though the University never questioned his professional competence but sought

to remove him solely because of his lack of cooperation stemming from differences of opinion about how to run a medical school. And a suspension, of course, temporarily prevents him from performing the tasks of the position, which he may enjoy and which may contribute to the development and maintenance of his career skills. See Lafferty v. Carter, 310 F. Supp. 465 (W.D. Wisc. 1970). (However, we are here discussing appellant's suspension as Head of the Department, not as a professor of surgery; and while the record indicates that the administrative position was important to him, its deprivation did not remove him from the "mainstream of his occupation" (310 F. Supp. at 470) as a teacher and surgeon.) Whatever damage appellant will suffer by a suspension is minimized by the requirement of a prompt post-suspension hearing, which limits the duration of the suspension and the extent of the damage he will suffer should the suspension later be found to have been unwarranted.

On the other side of the ledger is the University's interest in the prevention of harm to and efficient administration of the medical school and the University Hospital. The record indicates that although the head of a department at the University of Arizona is in immediate charge of administrative matters, the President and Board of Regents, being vested with the ultimate authority of the University, possess the power to make the decisions concerning the department and bear the responsibility for its proper operation. Consultation and compromise with a department head may in the end prove the best way for the President and Board to run the school. Nevertheless, as the ultimate authority, the President and Board are entitled to have a department head follow their orders. Some measure of loyalty and cooperation is required; without that cooperation a segment of the University, here the medical school and the University Hospital, may be injured either by

misadministration or a lack of administration. Thus, the University has a significant interest in suspending a potentially recalcitrant or disloyal department head in order to keep the channels of administration properly functioning, cf. Hostrop v. Board of Junior College District No. 515, 471 F.2d 488 (7th Cir. 1972); this is particularly true if his cooperation is not likely to improve pending a hearing. We conclude that the potential tthreat[5/] to the administration of the medical school and the incidental threat of disruption of the functioning of the University Hospital was sufficient to outweigh appellant's limited interest in a pre-suspension hearing.

The various opinions in Arnett, supra, support our conclusion that the procedure ordered by the court satisfied due process. There, Justice White, in the course of expressing his conclusion that a pre-termination hearing was required, nevertheless observed:

> "One must also consider another type of cost to the Government if preseparation hearings were provided -- the necessity of keeping a person on the scene who might injure the public interest through poor service or might create an uproar at the workplace. However, suspension with pay would obviate this problem." 416 U.S. at 194.

And Justice Powell, in his concurring opinion, expressed the view that a suspension with pay was unnecessary and that a post-termination hearing was adequate. 416 U.S. at 169 n.4. And finally, the three dissenters suggested that they, too, regard a suspension with pay pending a hearing in a better light than an immediate termination.

In conclusion, we decide that under the

circumstances of this case the ordered post-suspension hearing on appellant's status as Head of the Department satisfied the requirements of due process and that the court committed no error in limiting its injunction. We emphasize that under different circumstances, involving a more serious intrusion on a protected property interest, such as the professorship, or on a "liberty" interest, or an employment relationship in which loyalty and cooperation are less imperative, a pre-deprivation hearing may be required.

AFFIRMED

FOOTNOTES

Page 4 1. As a result, we express no opinion on the propriety of the district court's refusal to order appellant's reinstatement as professor.

Page 4 2. Appellant contends that unless we order reinstatement, he will be left without an effective remedy for the district court's error in not granting preliminary relief. Cf. Stewart v. Pearce, 484 F.2d 1031 (9th Cir. 1973).

Page 6 3. We do not reach the issue of whether the court may "balance the equities" to refuse to injunctively enforce a constitutional right, as we conclude here that the court adequately enforced appellant's due process rights.

Page 8 4. Assuming that the University is correct in contending that the campus

understanding is that a head of a department is subject to discretionary removal at any time, and that in accepting the position appellant was likewise subject to such removal, the Arnett plurality's position would dictate that in that case appellant has no right to any hearing, as the removal procedures condition the substantive right. As six of nine Justices rejected the position in Arnett, we do not follow it here. See 416 U.S. at 166-67 (Powell, J.); 416 U.S. at 177-78 (White, J.); 416 U.S. at 211 (Marshall, J.). Nevertheless, we note that the distinction drawn by those six Justices between substantive and procedural limitations on an "entitlement" is somewhat illusory in this case, as the common law of the campus understanding (if it exists) that a head of department is subject to summary removal, even if for cause, may equally lead either to the conclusion that such a removal satisfies due process, or that appellant does not have a substantive entitlement. See 88 Harv. L. Rev. at 87.

Page 11 5. We do not intimate that appellant in fact refused to perform tasks assigned by the administration or that his lack of cooperation ever damaged either the medical school or the Hospital -- the University's interest in obviating a potential threat is here sufficient to justify the suspension pending a hearing.

APPENDIX C

[SEAL]

THE UNIVERSITY OF ARIZONA
TUCSON, ARIZONA 85721

OFFICE OF THE PRESIDENT

July 31, 1973

PERSONAL

Erle E. Peacock, Jr., M.D.
Head, Department of Surgery
College of Medicine
The University of Arizona
Campus

Dear Erle:

I have reviewed the material that you provided for me and was pleased to have this additional insight to the Department of Surgery. There is no question in my mind at this point that the Department has developed into a very strong academic unit that is attracting national attention. Furthermore, from the statistics that you provided, it would appear that our medical students are being exposed to a reasonable spectrum of surgical procedures. In summary, you have done an effective job of developing the Department, and you should take a considerable measure of pride in this accomplishment.

Despite this record of achievement, I do have serious doubts about your ability to continue

to administer the Department effectively because of the serious philosophical differences that have developed between you and the College administration. Therefore, I feel that it would be in your Department's best interest if you would allow a transition of leadership which would cause a minimum degree of dislocation for the Department.

While I realize from our converstaions that this will be a decision that you will find personally difficult to accept, I hope that you will see Dr. DuVal immediately and will work with him in an attempt to develop a reasonable course of action.

Yours sincerely,

/s/ John P. Schaefer

John P. Schaefer

JPS:mh
Attachments
cc: Dr. Merlin K. DuVal